

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: July 10, 2023]

DOUGLAS FISHER,
Plaintiff,

v.

JAMIE LAU,
Defendant.

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C.A. No. PC-2021-00593

DECISION

CRUISE, J. This matter is before the Court following an order of remand to the Superior Court from the Rhode Island Supreme Court. The Supreme Court remand instructed this Court to complete a meaningful analysis of the issues raised. Jurisdiction is pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Douglas Fisher (Plaintiff) and Jamie Lau (Defendant) were in a relationship for approximately three years. (First Amended Complaint with Jury Demand (Am. Compl.) ¶¶ 3-4.) Throughout their relationship, Plaintiff suffered from emotional and mental health issues, which Plaintiff alleges Defendant was aware of, and Defendant engaged in activities that were likely to cause Plaintiff emotional, mental, and physical harm. *Id.* ¶¶ 4-8. Plaintiff contends that because of Defendant's alleged behavior, Plaintiff suffered great emotional distress and embarrassment as well as physical injury and significant medical expenses. *Id.* ¶¶ 10-12, 14-16. As a result of Defendant's alleged actions, Plaintiff filed a Complaint for intentional and negligent infliction of emotional distress on January 22, 2021. (Docket.)

On April 27, 2021, Defendant filed two motions: (1) a motion to dismiss the Complaint and (2) a motion to file a counterclaim under seal, which did not have a proposed counterclaim attached nor was one separately filed. *Id.*; *see also* Motion to File Counterclaim Under Seal (Apr. 27, 2021). Plaintiff objected to Defendant's motion to file a counterclaim under seal on April 29, 2021. (Docket.) On June 16, 2021, Defendant filed a second motion to file a counterclaim under seal; however, there was no proposed counterclaim filed with the motion nor separately submitted. *See* Counterclaim and Emergency Motion to Seal. A hearing was scheduled for Defendant's second motion to file a counterclaim under seal on June 17, 2021; however, that hearing passed. (Docket.) On August 19, 2021, another hearing was scheduled for Defendant's second motion to file a counterclaim under seal; however, the hearing also passed. *Id.*

On August 17, 2021, Plaintiff filed an Amended Complaint that added factual allegations of the specific conduct Defendant engaged in. (Am. Compl. ¶¶ 6, 8.) Defendant filed an Answer to the Amended Complaint on September 20, 2021, that (1) denied all material allegations and (2) explained that Defendant would be separately filing a counterclaim and a motion to file the counterclaim under seal. *See generally* Answer of Defendant Jamie Lau (Answer). That same day, Defendant filed a third motion to file a counterclaim under seal, and this time a counterclaim was separately submitted. *See* Motion to File Counterclaim Under Seal (Sept. 20, 2021); *see also* Counterclaim. On September 22, 2021, Plaintiff objected to Defendant's third motion to file a counterclaim under seal. (Plaintiff's Objection to Defendant's Motion to File Counterclaim Under Seal.)

Shortly thereafter, on September 24, 2021, Plaintiff filed a motion for a more definite statement that requested Defendant provide a date for when the allegations in the Counterclaim occurred. (Plaintiff's Motion for a More Definite Statement Pursuant to R.I. Super. Ct. R. Civ. P.

12(e).) On October 7, 2021, the Court held a hearing on Plaintiff's motion for a more definite statement and the Court (1) granted Plaintiff's motion and (2) continued the hearing on Defendant's motion to file a counterclaim under seal to October 21, 2021. (Order (Oct. 20, 2021).) The October 21, 2021 hearing was rescheduled to November 4, 2021. (Docket.)

On October 25, 2021, Plaintiff filed a supplemental memorandum in support of his objection to Defendant's third motion to file a counterclaim under seal. (Plaintiff's Supplemental Memorandum in Support of Plaintiff's Objection to Defendant's Motion to File Counterclaim Under Seal.) On November 4, 2021, the Court held a hearing on Defendant's third motion to file a counterclaim under seal, and the Court denied the motion. *See* Docket.¹

Thereafter, on November 15, 2021, Defendant filed an Amended Counterclaim that included additional factual allegations in support of Defendant's invasion of privacy claim pursuant to G.L. 1956 § 9-1-28.1 (the Counterclaim). *See* Amended Counterclaim (Am. Countercl.). Plaintiff filed a motion to dismiss the Counterclaim on November 22, 2021 (Plaintiff's Motion) and a memorandum of law in support thereof. (Docket.) On January 10, 2022, Defendant filed an objection to Plaintiff's Motion (Defendant's Objection) which included additional exhibits that were not previously incorporated into the Complaint. *Id.*

On January 13, 2022, the Court heard argument on Plaintiff's Motion and the Court granted Plaintiff's Motion. *Id.* On January 20, 2022, prior to the Court entering an Order reflecting the results of the January 13, 2022 hearing, Defendant filed a Notice of Appeal to the Rhode Island Supreme Court. *Id.* On January 21, 2022, the Court entered an Order reflecting its decision to

¹ No Order was entered to reflect the results of the November 4, 2021 hearing. *See generally* Docket.

grant Plaintiff's Motion at the January 13, 2022 hearing (the Order). (Order (Jan. 21, 2022).) The case was certified to the Supreme Court on February 7, 2022. (Docket.)

On appeal, our Supreme Court explained that Plaintiff's Motion should have been evaluated as a motion for summary judgment because this Court did not "explicitly exclude the affidavit and exhibits attached to defendant's memorandum" in support of Defendant's Objection when making its decision. *Fisher v. Lau*, 291 A.3d 1261, 1261-62 (R.I. 2023). Furthermore, the Supreme Court determined that its review of this Court's dismissal of the Counterclaim was "premature" because there was no explanation of "the material and undisputed facts relied upon" by this Court in reaching its decision. *Id.* at 1262. Consequently, the Supreme Court vacated the Order and remanded the case to the Superior Court with instructions to "complete a meaningful analysis of the issues raised, consistent with this order." *Id.* The case was returned to the Superior Court on May 9, 2023. (Docket.)

II

Standard of Review

"Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 451 (R.I. 2013) (quoting *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013)). Indeed, "[s]ummary judgment is appropriate only when the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Sola v. Leighton*, 45 A.3d 502, 506 (R.I. 2012) (quoting *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005)).

"The moving party bears the initial burden of establishing the absence of a genuine issue of fact." *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (quoting Robert B.

Kent et al., *Rhode Island Civil Procedure* § 56:5, VII-28 (West 2006)). Then the burden shifts and, as reiterated by the Rhode Island Supreme Court recently:

“The party opposing summary judgment bears the burden of proving, by competent evidence, the existence of facts in dispute. The opposing party will not be allowed to rely upon mere allegations or denials in the pleadings but rather, by affidavits or otherwise the opposing party has an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact.” *Henry v. Media General Operations, Inc.*, 254 A.3d 822, 834 (R.I. 2021) (citations omitted).

III

Analysis

As instructed by our Supreme Court, Plaintiff’s Motion is automatically converted to a motion for summary judgment because this Court previously did not explicitly exclude the exhibits that Defendant submitted in support of her Objection which were not expressly incorporated into the Complaint. *See Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 22 (R.I. 2018) (“when a motion to dismiss includes documents as exhibits that were either mentioned or referred to in a complaint but not expressly incorporated, and the hearing justice does not ‘explicitly exclude them from . . . consideration,’ the motion ‘automatically’ converts to one for summary judgment”). Accordingly, the Court will proceed with its analysis of Plaintiff’s Motion pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.

Plaintiff argues that the Counterclaim is a permissive counterclaim and as such, is not subject to the relation back doctrine. (Memorandum of Law in Support of Plaintiff’s Motion to Dismiss Defendant’s Counterclaim and Amended Counterclaim (Pl.’s Mem.) 3.) In support, Plaintiff contends that “[a]lthough [the Counterclaim] involves the same parties, it does not arise from the same transaction or occurrence” because the Counterclaim arises out of actions that allegedly occurred in March of 2018, while the allegations in the Complaint occurred in January

of 2018. *Id.* Plaintiff therefore argues that because the Counterclaim is not a compulsory counterclaim, it is barred by the three-year statute of limitations for an invasion of privacy claim because it was not filed before March 30, 2021 (i.e., three years from when the alleged conduct occurred). *Id.* at 4. Accordingly, Plaintiff submits that because the initial counterclaim was time-barred when filed, the amended counterclaim cannot relate back to the date of the filing of the first counterclaim. *Id.*

Conversely, Defendant argues that the Counterclaim is not time barred because “the actions of the Plaintiff contained in the Counterclaim relate to the same incidents complained of in the Plaintiff[s] Complaint, it’s a common nucleus of facts” and “defendants should be given ‘wide latitude’ in presenting claims against adversaries” under Rule 13(a). (Memorandum of Law in Opposition of Plaintiff’s Motion to Dismiss (Def.’s Mem.) 1-2.) In support, Defendant submits that the filing of a complaint tolls the statute of limitations for “any event out of the same transactions or occurrence that the Defendant would have a counterclaim for” and as such, “the events that occurred within the Counterclaim arise from the alleged actions contained in the Plaintiffs Complaint.” *Id.* at 1. Furthermore, Defendant argues that Plaintiff is arbitrarily cutting off the relationship’s communications as of January 2018 when the relationship consisted of a series of events that led to the instant lawsuit. *Id.* at 2-3.

A

Whether the Counterclaim is a Compulsory Counterclaim

Rule 13 of the Superior Court Rules of Civil Procedure (Rule 13(a)) states, in pertinent part:

“(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing

party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action, or if the opposing party's claim is for damage arising out of the ownership, maintenance, operation, use, or control of a motor vehicle by the pleader.

“(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party.” Super. R. Civ. P. 13.

Additionally, “[c]ompulsory counterclaims must be asserted in the first responsive pleading.” *Shelter Harbor Fire District v. Vacca*, 835 A.2d 446, 450 (R.I. 2003) (*Vacca*) (citing Super. R. Civ. P. 13(a)). If the counterclaim is not pled in the first responsive pleading, “a defendant will be barred from further litigating the claim.” *Faerber v. Cavanagh*, 568 A.2d 326, 328 (R.I. 1990) (citing Super. R. Civ. P. 12(a); *Serra v. Ford Motor Credit Co.*, 463 A.2d 142, 149 (R.I. 1983)).

Here, the issue is whether the alleged events in the Counterclaim arose out of the same transaction or occurrence as the allegations in the Complaint. Although Rhode Island case law is sparse on what constitutes the same transaction or occurrence, Rule 13(a) of the Superior Court Rules of Civil Procedure mirrors Rule 13(a) of the Federal Rules of Civil Procedure. *Compare* Super. R. Civ. P. 13(a) *with* Fed. R. Civ. P. 13(a).² Additionally, Rule 13(a) of the Superior Court Rules of Civil Procedure and Rule 13(a) of the Federal Rules of Civil Procedure have the same purpose; to promote judicial economy. *See Abedon v. Providence Redevelopment Agency*, 115 R.I.

² Rule 13(a) of the Federal Rules of Civil Procedure states, in pertinent part:

“(a) **COMPULSORY COUNTERCLAIM.**

“(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

“(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

“(B) does not require adding another party over whom the court cannot acquire jurisdiction.” Fed. R. Civ. P. 13(a).

512, 514, 348 A.2d 720, 721 (1975) (“Rule 13 is designed to eliminate multiplicity in litigation”); *Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO v. G. P. Thompson Electric, Inc.*, 363 F.2d 181, 184 (9th Cir. 1966) (“the purpose of design of Rule 13(a) is to prevent multiplicity of litigation and to bring about prompt resolution of all disputes arising from common matters”). Accordingly, the Court will look to Federal law to aid in its determination of whether the Counterclaim is a compulsory counterclaim under Rule 13(a).

While there are four tests that a federal court may apply to determine whether a claim and counterclaim arise out of the same transaction or occurrence, “virtually all federal courts recognize some form of a ‘logical relationship’ test for defining when claims are part of the same transaction, that, on its own, would be sufficient indicia that a claim and a counterclaim arise from the same transaction or occurrence.” 1 Steven S. Gensler & Lumen N. Mulligan, *Federal Rules of Civil Procedure, Rules and Commentary* Rule 13 (Westlaw Feb. 2023 Update); *see also* 6 Wright & Miller, *Federal Practice and Procedure* § 1410 (3d. ed.) (Westlaw Apr. 2023 Update) (“over the years it has become clear that the . . . logical relationship [test] is the preferred approach for determining what claims arise out of the same transaction or occurrence”). Moreover, the United States Supreme Court has explained that “[t]ransaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926).

Here, the Counterclaim alleges that Plaintiff violated Defendant’s right to privacy pursuant to § 9-1-28.1 when Plaintiff distributed private photos of Defendant to Defendant’s new boyfriend, Mike Roy (Roy). *See generally* Am. Countercl.; *see also* Def.’s Mem. Ex. (Affidavit of Roy) ¶¶ 4-5 (Roy explaining that Plaintiff had been contacting him about Defendant from January 2018

through April 2018). Specifically, Defendant alleges that the distribution of the photos occurred around March 30, 2018, and Plaintiff had continued to contact Defendant and Roy for some time thereafter. Am. Countercl. ¶¶ 4-8; *see also* Affidavit of Roy ¶¶ 4-5. On the other hand, the Amended Complaint alleges that Plaintiff and Defendant were in a romantic relationship from sometime in 2015 until January 25, 2018. (Am. Compl. ¶¶ 3-4.) The Amended Complaint does not include any allegations of events or communications between the parties that occurred after January 25, 2018. *See generally id.*

Here, the “transaction” is the relationship—romantic or otherwise—between the Plaintiff and Defendant because a transaction “may comprehend a series of many occurrences” and is not dependent “upon the immediateness of their connection as upon their logical relationship.” *Moore*, 270 U.S. at 610. Even though the events in the Counterclaim and the Amended Complaint arise from different dates, by applying the logical relationship test, it is clear to the Court that the allegations in the Counterclaim arise out of the same transaction or occurrence as the allegations in the Complaint, i.e., the previous relationship between Plaintiff and Defendant. Therefore, the Counterclaim is a compulsory counterclaim pursuant to Rule 13(a) because the allegations in the Counterclaim arise from the same transaction that forms the basis for the allegations in the Complaint. *See* Super. R. Civ. P. 13(a).

B

Whether Defendant Timely Pled the Counterclaim

Having determined that the Counterclaim is a compulsory counterclaim, the next issue is whether Defendant properly asserted the Counterclaim in Defendant’s first responsive pleading. *See Vacca*, 835 A.2d at 450 (a “[c]ompulsory counterclaim[] must be asserted in the first responsive pleading”); *see also* Super. R. Civ. P. 13(a). If the counterclaim is not pled in the first

responsive pleading, then “a defendant will be barred from further litigating the claim.” *Faerber*, 568 A.2d at 328 (citing Super. R. Civ. P. 12(a); *Serra*, 463 A.2d at 149).

The Superior Court Rules of Civil Procedure do not specifically define what constitutes a “responsive pleading.” *See generally* Super. R. Civ. P. However, when reviewing said rules, it is clear that a responsive pleading does not include a motion to dismiss; instead, a responsive pleading typically includes an answer to the complaint, crossclaim, or counterclaim. *See, e.g.*, Super. R. Civ. P. 12(a)(3)(A) (the responsive pleading must be served within ten days of the court’s denial of a Rule 12 motion), Super. R. Civ. P. 15(a) (a party may amend its pleading once as a matter of course at any time before a responsive pleading is served); *see also* Black’s Law Dictionary (11th ed. 2019) (defining responsive pleading as “[a] pleading that replies to an opponent’s earlier pleading. *See Answer*”). Therefore, a compulsory counterclaim must be asserted when a party files its first responsive pleading i.e., when the party files its answer. *See Vacca*, 835 A.2d at 450. Accordingly, Defendant was required to submit the Counterclaim at the time Defendant filed its Answer to the Amended Complaint. *See id.*

In this case, Defendant filed a motion to file a counterclaim under seal on April 27, 2021, without the counterclaim attached as an exhibit or separately filed. *See* Docket. At that time, Defendant did not file an answer to the Complaint; instead, Defendant filed a motion to dismiss the Complaint which was later denied by the Court on August 24, 2021. *Id.* Plaintiff filed an Amended Complaint on August 17, 2021. (Docket.) Defendant filed an Answer to the Amended Complaint on September 20, 2021; it was at that time that Defendant filed the Counterclaim along with her third motion to file a counterclaim under seal. *Id.* Therefore, Defendant asserted the Counterclaim—which is a compulsory counterclaim as discussed previously—in her first

responsive pleading, her Answer to the Amended Complaint. Accordingly, Defendant properly filed the Counterclaim. *See Vacca*, 835 A.2d at 450.

IV

Conclusion

For the foregoing reasons, Plaintiff's Motion is **DENIED**. Counsel shall prepare and file an order consistent with this Decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Douglas Fisher v. Jamie Lau

CASE NO: PC-2021-00593

COURT: Providence County Superior Court

DATE DECISION FILED: July 10, 2023

JUSTICE/MAGISTRATE: Cruise, J.

ATTORNEYS:

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